**Jackson Hospital Corporation d/b/a Kentucky River Medical Center *and* United Steelworkers of America and Anita Turner.** Cases 9–CA–37734 , 9–CA–37796, 9–CA–37795-1, -2, 9–CA–37875, 9–CA–38084-1, –2, 9–CA–38237, and 9–CA–38468

July 9, 2009

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN LIEBMAN AND MEMBER SCHAUMBER

At issue in this compliance proceeding are the Respondent's backpay and reinstatement obligations to discriminatee Melissa Turner.[1] The Board previously found that the Respondent unlawfully discharged Turner on August 17, 2000, and ordered the Respondent to pay Turner backpay and offer her reinstatement to her former position as an X-ray technician.[2] To date, the Respondent has neither offered Turner reinstatement nor paid her any backpay. Citing multiple grounds, the Respondent contends that Turner has forfeited her right to reinstatement, simultaneously tolling backpay. In the alternative, the Respondent claims the judge erred in denying certain setoffs to its gross backpay liability.[3] The General Counsel excepts to the judge's finding that a setoff is warranted for a 6-month period in 2002–2003.[4]

The National Labor Relations Board[5] has considered the supplemental decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[6] and conclusions as modified below.

We address three principal issues here: (1) the effect of Turner's felony conviction; (2) the effect of Turner's quitting an interim job; and (3) the effect of Turner's medical leave.

1. *Felony Conviction*. For the reasons set forth below, we agree with the judge that Turner's eligibility for backpay and reinstatement is not cut off because of her November 2002 felony conviction for attempting to solicit a controlled substance by fraud. Turner's crime consisted of seeking a Demerol injection at one hospital to treat an al-

[1] On February 26, 2008, Administrative Law Judge Michael A. Rosas issued the attached supplemental decision. The General Counsel and the Respondent each filed exceptions and a supporting brief, as well as answering briefs and reply briefs. The Respondent further filed a motion to strike the General Counsel's answering brief in its entirety, and the General Counsel filed an opposition to the motion to strike. We denied the motion to strike on June 30, 2008.

[2] 340 NLRB 536 (2003), enfd. mem. per curiam Case No. 04-1019 (D.C. Cir. June 3, 2005). The Board found that Turner was discharged in violation of Sec. 8(a)(3) for engaging in a strike. 340 NLRB at 602–606.

[3] We reject the Respondent's contention that this proceeding should be remanded to provide it "a full opportunity to develop a complete record pursuant to the evidentiary scheme embraced" by the Board in *St. George Warehouse*, 351 NLRB 961 (2007), which issued prior to the final day of the hearing in this case. First, the Respondent does not identify what "additional evidence" it would have adduced at the hearing had the *St. George Warehouse* evidentiary framework been Board law when the hearing opened. Second, even if we were to speculate, it is difficult to imagine what different or "additional" evidence the Respondent would have put forward given the fact that both before and after *St. George Warehouse* the ultimate burden of persuasion on a discriminatee's failure to mitigate remained on the discriminating respondent. Finally, the General Counsel actually called Turner to testify at the hearing concerning her mitigation efforts, which satisfied his modified burden under *St. George Warehouse*. Therefore, the Board's decision in that case provides no basis for remanding this case to provide the Respondent an opportunity to put on additional evidence.

[4] In affirming the judge's 2002–2003 setoff finding, we rely only on the credited testimony of Sherry Wells, director of radiology at Clark Regional Medical Center, who testified that, in a March or April 2003 job interview, Turner told her that she had married and moved to West Virginia in August 2002 and lived there until February 2003. Wells' testimony is supported by her contemporaneous interview notes, which Turner reviewed and signed. There is no evidence that Turner sought work in West Virginia.

Contrary to the General Counsel's further exceptions, the judge did not err in not (re)ordering the Respondent to reinstate Turner and in not expressly providing that backpay continues to accrue beyond the end date of the instant compliance specification. With regard to reinstatement, this remedy has already been ordered by the Board and enforced by the court of appeals. Thus, it was unnecessary for the judge to reorder the remedy. *Fluor Daniel, Inc.*, 350 NLRB 702, 702 fn. 5 (2007); *Bryan Adair Construction Co.*, 341 NLRB 247, 247 fn. 4 (2004). With regard to backpay, the Respondent's liability for backpay beyond the terminal date of the instant compliance specification is an unresolved matter to be determined if and when the General Counsel issues a supplemental compliance specification.

[5] Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Liebman and Member Schaumber constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act. See *Snell Island SNF LLC v. NLRB*, __ F.3d __, 2009 WL 1676116 (2d Cir. June 17, 2009); *New Process Steel v. NLRB*, 564 F.3d 840 (7th Cir. 2009), petition for cert. filed __ U.S.L.W. __ (U.S. May 27, 2009) (No. 08-1457); *Northeastern Land Services v. NLRB*, 560 F.3d 36 (1st Cir. 2009), rehearing denied No. 08-1878 (May 20, 2009). But see *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), petitions for rehearing denied Nos. 08-1162, 08-1214 (July 1, 2009).

[6] The Respondent and the General Counsel have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

leged toothache and untruthfully denying having received a prescription for Percocet for the same ailment earlier in the day at a different hospital. The judge did not credit Turner's testimony that she was seeking Demerol to relieve the pain of a toothache; thus, the judge seems to have implicitly concluded that Turner was a substance abuser (and the Respondent appears to agree with this implicit conclusion). The Respondent contends that Turner's conviction terminates its obligation to offer her reinstatement and tolls its backpay liability.[7]

The Respondent bears the burden of proof as to this assertion. Once the General Counsel has met his burden of establishing the gross amount of backpay due, the burden shifts to the employer to prove any defenses in mitigation of its backpay liability.[8] We find that the Respondent failed to prove its assertion that it would have discharged Turner for her misconduct and resulting felony conviction. As the judge observed, what to do about an employee convicted of a felony was not an unprecedented situation for the Respondent. Several years earlier, Carol Hudson, a registered nurse employed by the Respondent, had been convicted of a felony for concealing her husband's home-based marijuana-growing and -selling operation.[9] The Respondent continued Hudson's employment.[10] It also continued to employ a dozen or more substance-abusing employees who were offered treatment under the Respondent's Employee Assistance Program (the EAP participants). These situations, while dissimilar in some respects, still constitute evidence of Respondent's past practice of dealing with comparable misconduct.

The Respondent argues that Turner cannot be compared to the EAP participants because they voluntarily admitted their substance abuse to the Respondent and sought treatment without first being caught by the Respondent or law enforcement. But Turner was unlawfully discharged nearly 2 years before she committed the crime. We cannot know whether Turner might have availed herself of the EAP plan had she remained in the Respondent's employ. However, we do know that her unlawful discharge eliminated that treatment possibility.

Similarly, we reject the Respondent's contention that Hudson was, reasonably, treated more leniently because her attorney and probation officer, unlike Turner's, communicated with the Respondent about continuing Hudson's employment. Turner's attorney and probation officer understandably did not contact the Respondent to have similar discussions about continuing Turner's employment, since she had no employment to continue due to her unlawful discharge 2 years earlier.[11]

We recognize that Hudson's felony did not involve an attempt to obtain a controlled substance for her own use, and Turner's did. We also recognize that the nature of Turner's violation might reasonably cause the Respondent concern about her future misuse of the controlled substances found in its hospital. As the judge found, however, the Respondent closely tracked and monitored such substances; and it apparently deemed such measures sufficient to resolve its concerns regarding EAP participants with a history of drug abuse, including doctors and nurses having much greater access to controlled substances subject to abuse than did X-ray technician Turner, whose access to controlled substances was limited to ones of no interest whatsoever to a drug abuser, i.e., contrast dye and nuclear liquid.

In addition, as stated above, the judge discredited Bevins' testimony concerning three additional purported disciplinary violations by Turner justifying denial of reinstatement. The Respondent's attempt to bolster its position with discredited reasons further supports a conclusion that the true reason for its decision to deny Turner reinstatement was one the Respondent wished to conceal.[12]

[7] The judge discredited the testimony of the Respondent's former CEO, David Bevins, that the decision to bar Turner from reinstatement was based on three more reasons in addition to her felony conviction. As stated above, we find no basis for reversing the judge's credibility findings.

[8] *Parts Depot, Inc.*, 348 NLRB 152, 153 (2006), enfd. 260 Fed. Appx. 607 (4th Cir. 2008); *Beverly California Corp.*, 339 NLRB 776, 777 (2003).

[9] Contrary to the Respondent's contention that Hudson's situation is distinguishable because her crime was not a felony, the record contains ample evidence that she was convicted of a felony, including admissions to that effect by both Hudson herself and the Respondent.

[10] To the extent that the Respondent contends that the mere fact of Turner's felony conviction without more—i.e., considered apart from the acts for which Turner was convicted—deprived her of reinstatement, its continued employment of Hudson after her felony conviction refutes such a contention. See *Beverly California*, supra (finding that employer failed to establish that it would have discharged backpay claimant Adalpe based solely on issuance of a state citation).

[11] We also reject the Respondent's contention that Turner was permissibly treated differently because her crime, unlike Hudson's, was "deliberate." Whatever the legitimacy of an employer's reliance on such considerations in exercising its discretion, the evidence here indicates that Bevins had little or no information beyond the title of Turner's offense and the fact that it was a felony when he concluded that Turner's conviction disqualified her from employment. The Respondent did not obtain a copy of Turner's court file until about one week before the start of the backpay hearing. Thus, whether Turner's conduct was "deliberate" (a term Bevins found not applicable to Hudson's conduct, even though intent is an indispensable element of any felony) was something Bevins did not determine until *after* he had decided that the conviction disqualified Turner from reinstatement.

[12] See *Metropolitan Transportation Services*, 351 NLRB 657, 659–660 (2007).

Resolving uncertainties against the Respondent, as precedent requires,[13] we find that the Respondent has failed to show that it would have discharged Turner for her misconduct and resulting felony conviction, such that she would have been disqualified from continued or future employment. Thus, we affirm the judge's finding that Turner's felony conviction did not toll her backpay or terminate the Respondent's duty to offer her reinstatement in accordance with the terms of the Board's court-enforced Order.

2. *Interim Job*. We adopt the judge's finding that Turner's departure from her job at Gram Resources in July 2002 does not affect her eligibility for subsequent backpay. Crediting Turner's testimony as to her "personal reasons for changing jobs during the period leading up through the second quarter of 2002," the judge found that Turner reasonably left that employment because the work hours became incompatible with her child-care obligations. We disagree with the Respondent's assertion that the judge "disregarded" or failed to consider the testimony of Gram's administrator, Ken Holbrook, that Turner quit upon realizing that she was about to be fired. Instead, we conclude that the judge implicitly discredited Holbrook's testimony by finding that Turner quit because of childcare issues and did not know at the time that Holbrook intended to fire her.[14] Like the judge, we thus need not determine whether Turner actually engaged in the alleged misconduct at Gram to which Holbrook testified.[15]

3. *Medical Leave.* Turner was on medical leave from her interim employment at Clark Regional Medical Center—first for pregnancy complications and then for postpartum recovery—from October 28, 2005, through June 25, 2006. Her job remained open during much of her leave, but Clark filled her slot on May 22, 2006 (after Turner had given birth but before she received medical clearance to return to work). Amending its answer to the compliance specification on the first day of the hearing, the Respondent alleged that this medical leave—lasting well beyond the extent legally protected by the Family and Medical Leave Act (FMLA)—would have likewise caused Turner to lose her job with the Respondent, had it still employed her at the time. Thus, the Respondent contended at hearing that the medical leave should cut off Turner's backpay and her eligibility for reinstatement.[16]

The judge failed to address the Respondent's medical-leave defense, and the Respondent now argues that we must remand the case to the judge for findings on the defense. The Respondent does not seek to have the hearing reopened for further evidence on the issue, however; it argues only that the Board should remand the case to the judge "to prepare a supplemental decision that properly addresses its maternity leave defense." Moreover, the Respondent had a full and fair opportunity to make its case on its medical leave defense at the hearing. As the Respondent is therefore not entitled to a remand as a matter of due process, and mindful that nearly 9 years have passed since Turner's unlawful discharge in 2000 without her having yet received any remedy, we turn to the record to determine whether it permits us to avoid further delay by deciding the merits of the medical-leave defense here.

We find that it does. The Respondent presented two types of evidence regarding its medical leave policy: its written leave policy and testimony about the policy's application by former CEO Bevins. The policy is subject to interpretation by the Board just as it would be by the judge, and Bevins' testimony was not disputed by any other witness, so no demeanor-based credibility determinations are needed. In these circumstances, we find it unnecessary to delay resolution of the case by remanding this issue to the judge.

Assuming the Respondent's medical-leave defense is cognizable, we conclude, for the reasons that follow, that the Respondent failed to meet its burden of proving that it would have lawfully discharged Turner because of her 8-month medical leave.

The Respondent's written leave policy provides that employees are entitled to 12 weeks' leave pursuant to the FMLA, and it further specifies how requests for extensions of leave must be submitted. It does not address, however, how long such extensions may last or what factors determine an employee's eligibility for an extension. The policy, which also covers other types of leaves, further contains a provision for personal leaves of absence. This provision states that

> [r]equests for personal leave of absence (for individuals not eligible for FMLA or for reasons not FMLA eligible) will be considered for a reasonable period of time

[13] *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990); *Wellstream Corp.*, 321 NLRB 455, 461 (1996).

[14] While it would have been helpful had the judge more directly stated the basis for his conclusions, his failure to do so does not violate Board Rules and Regulations § 102.45(a), as the Respondent contends.

[15] Thus, we do not rely on Holbrook's testimony as evidence reflecting on Turner's tendencies regarding truthfulness or industriousness.

[16] The General Counsel does not assert that Turner is entitled to backpay for the period during which she was on medical leave and unable to work; at issue is her eligibility for backpay and reinstatement *after* her medical leave, when the loss of her job at Clark left her unemployed for nearly a year.

> up to 90 days if the facility is able to obtain a satisfactory replacement during the time the employee would be away from work. The leave may be extended for a reasonable period of time due to special circumstances, as determined on an individual basis and approved by the supervisor and Human Resources Department.

The policy does not specify whether an employee who has exhausted her FMLA leave for the year may use a personal leave of absence to extend her leave; however, such an employee could legally and logically be considered an "individual[] not eligible for FMLA" as referenced in the personal leave of absence policy.

Bevins testified that employees who exhaust their FMLA leave are placed on PRN "as needed" status for 2 more months, but if they are unable to work at least three shifts while on PRN status, they are discharged.[17] Bevins further testified about several employees who had been placed on PRN status after a medical leave. One such employee, Michelle Noble, was discharged for failing to be available for work while on PRN status. Another employee was retained because she became able to work (and successfully reapplied for her regular position, which had been posted for applicants) before her PRN status expired. Bevins testified that he was not aware of the Respondent ever retaining an employee after a medical leave of 8 months.

Turner was unable to work at all for 8 months. Thus, based on Bevins' testimony, the Respondent contends that it would have lawfully discharged Turner no later than 5 months into her medical leave (approximately 3 months' FMLA leave plus 2 months' PRN status), and thus her backpay and reinstatement right should be cut off as of the first quarter of 2006.

We find, however, that there are material tensions between Bevins' testimony and the Respondent's written leave policy. Specifically, the written policy provides various ways in which an employee may be able to extend her medical leave beyond the 12 weeks required by the FMLA: either by the extension of FMLA leave (the limits and eligibility conditions of which are not detailed in either the written policy or in Bevins' testimony) or perhaps by taking a personal leave of absence (the terms of which, set forth above, are even more vague) at the conclusion of her FMLA leave.

Thus, the Respondent's written policy could be read to provide for a leave long enough to cover Turner's 8-month medical incapacity, and Bevins' testimony did not eliminate this possibility. Bevins testified that the Respondent's usual practice is to put employees on PRN status at the end of their 12-week FMLA leave, and he further testified that Michelle Noble was discharged for failing to be available for work during this PRN-status time. The record leaves open the possibility, however, either that Noble simply had not requested a leave extension or that she had, but the request had been denied. Similarly, Bevins' testimony that he could not name any employee who had been reinstated after an 8-month leave does not prove that a request for such an extension would have been denied, absent evidence that any employee had ever made such a request.[18] Moreover, Bevins' testimony entirely fails to address the written policy's provision of personal leaves of absence, let alone the interaction between such leave and exhausted FMLA leave.[19]

Because neither the written policy nor Bevins' testimony clearly addresses the procedures, conditions, or possible duration of FMLA leave extensions or the use of personal leaves to supplement FMLA or other leave, the record does not preclude the possibility that Turner may have been eligible for an extended leave that could have lasted as long as her incapacity, and thus for reinstatement upon obtaining medical clearance. Accordingly, assuming arguendo that the Respondent's medical leave defense is cognizable, and resolving uncertainties against the Respondent, it failed to sustain its burden to prove that Turner's medical leave in 2005–2006 would have resulted in a refusal to reinstate her when she was cleared to return to work, disqualifying her from reinstatement and further backpay.

## ORDER

The National Labor Relations Board adopts the recommended supplemental Order of the administrative law judge and orders that the Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, Jackson, Kentucky, its officers, agents, successors, and as-

[17] Bevins testified that employees' retention after 2 months on PRN status would be based on three call-ins during that period. Although his testimony was ambiguous as to whether such employees were required to respond no later than the third call-in or whether they were required to work at least three call-in shifts during the 2 months, the Respondent's brief applies the latter characterization. In either event, Turner, who was entirely prohibited from working during those months, would have been unable to comply.

[18] Bevins' testimony implies, but does not expressly state, that placement on PRN status for 2 months constitutes the extension of leave provided for in the written policy. Logically, however, an employee's placement on "on call" status, with an obligation to respond at least three times or face discharge, does not seem to constitute an extension of her "leave."

[19] Nor did the Respondent offer evidence that it had no open positions into which Turner could have been placed, either at or after the time she was medically cleared to return to work. Absent such evidence, we cannot conclude that the Respondent would have refused to reinstate Turner, let alone conclude that, if it had done so, such refusal would have been based on legitimate considerations.

signs, shall take the action set forth in the supplemental Order.

Dated, Washington, D.C. July 9, 2009

Wilma B. Liebman, Chairman

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

*Julius Emetu, Esq.,* for the General Counsel.
*Don T. Carmody, Esq.,* of Painted Post, New York, and *Bryan Carmody, Esq.,* of Stanford, Connecticut, for the Respondent.
Randy Pidcock, of Frankfort, Kentucky, for the Union.

## SUPPLEMENTAL DECISION

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Jackson, Kentucky, on July 16, 17, and 18, 2007, and October 17, 2007. On September 30, 2003, the National Labor Relations Board (Board) issued its Decision and Order (340 NLRB 536) requiring, in pertinent part, the Respondent reinstate and make whole Melissa Turner (Turner),[1] for any loss or earnings she may have suffered as a result of the Respondent's unfair labor practices in violation of Section 8(a)(3) and (1) of the National Labor Relations Act. On June 3, 2005, the United States Court of Appeals for the District of Columbia Circuit entered its judgment enforcing the Board's Decision and Order. On May 25, 2007, the Board's Regional Director for Region 9, pursuant to Section 102.54 of the Rules, issued an amended second compliance specification and notice of hearing alleging the Respondent refused to reinstate Turner and give her backpay for the applicable period, beginning August 17, 2000, and continuing through the current time. As of the first quarter of 2007, the alleged backpay owed Turner was $100,956, not including interest. In its answer, the Respondent admits its refusal to reinstate and pay Turner backpay, but asserts that backpay is tolled for several reasons.

On the entire record, including my observation of the demeanor of the witnesses, I make the following

## FINDINGS OF FACT

### I. TURNER'S INTERIM EARNINGS

Turner, the discriminatee, was employed by the Respondent as an x-ray technician earning $16.63 per hour. Her home was located about a mile from the Respondent's facility. Turner worked 40-hour weeks, was on-call for nights and weekends, and occasionally received overtime work. Turner's shift was from 7 a.m. to 3:30 p.m., Monday through Friday. In that role, Turner performed x-rays, CT scans, ultrasound, mammography, and general office duties.[2] As an x-ray technician, she came in contact with two controlled substances—contrast dye for CT patients and radioisotopes, a radioactive liquid used in x-rays. Both were regulated and released by the Respondent's pharmacy only in connection with a specific order by a radiologist.[3]

In August 2000, Turner participated in a strike held on the Respondent's premises. During the strike, Turner worked for St. Joseph's Hospital East (St. Joseph's) in Lexington, Kentucky. On August 17, 2000, the Respondent discharged Turner on the ground of misconduct.[4] In 2000, prior to her discharge, Turner earned $19,074.59 during her employment by the Respondent.[5]

After she was discharged, Turner continued her part-time position with St. Joseph's, which is located approximately 86.5 miles from Jackson. While employed at St. Joseph's, Turner obtained part-time positions with Medical Staffing Network, Inc. (MSN). She also attended orientation at Clark Regional Medical Center (Clark) in Winchester, but worked only 3 days. Clark is located approximately 67.5 miles from Jackson.

Turner continued working for St. Joseph's until January 2001, when she resigned for a position at Samaritan Medical Center (Samaritan). Turner's reason for leaving was that the long commute made it difficult for her to pick her daughter up at school on time. The approximate hourly wage was $18. In 2000, Turner earned $14,255.71 with St. Joseph's, $2,017 with MSN, and $462.40 from Clark. Turner also received accrued pay from St. Joseph's in 2001 totaling $1,153.18.[6]

Turner, however, changed her mind after attending orientation and declined the position with Samaritan. The commute to Samaritan—85.5 miles—was nearly as long as the commute to St. Joseph's.[7] Child care was a serious consideration for Turner,

[1] Charging Party Anita Turner and discriminate Melissa Turner are separate individuals.

[2] Turner submitted evidence that she consistently received positive annual performance evaluations and regularly scheduled wage increases. (Tr. 167.) The Respondent countered with evidence that she was warned about lateness and disciplined on several occasions. (Tr. 232–233; R. Exh. 9.) Whether Turner was a good or bad employee may have had some relevance to the underlying case. It did not have any here.

[3] It was clear that the nuclear medicine that Turner came in contact with as an x-ray technician was closely regulated and tracked for each patient. It was not something that was lying around in a medicine cabinet. (Tr. 463–489.)

[4] The termination form was dated August 17, but the personnel action form stated August 15. (R. Exh. 9.)

[5] These facts are not in dispute. (GC Exh. 8; Tr. 133–136, 143–144, 283.)

[6] The wage information contained at GC Exh. 8 conforms to the summary prepared by Jon Grove, a Board compliance officer, at GC Exh. 3, Appendix A (revised). The expenses listed on GC Exh. 3, Appendix A (revised), were appropriately derived from Appendix B (revised) and represent extra miles driven by Turner to her interim employment, above and beyond the 2-mile round trip distance that she drove to the Respondent's facility. Appendix B (revised) lists the "net" round trip distance to each of Turner's interim employers. Her expenses for each quarter of the backpay period were appropriately calculated by the number of round trip miles per quarter multiplied by the allowable mileage rate.

[7] Mile references to one-way travel to employment locations are based on half of the "net round trip distance" as listed in GC Exh. 3, Appendix B (Revised).

a single parent, whose child would get out of school at 3 p.m. As a result, Turner accepted employment with Appalachian Regional Healthcare, Inc. (Appalachian) in January 2001. The commute to Appalachian was 27.5 miles. However, by the fall of 2001, a shift in Turner's schedule from the morning shift to the afternoon shift again caused her child care complications and motivated her to seek employment elsewhere. Turner earned $25,012.71 at Appalachian in 2001.

In October 2001, Turner accepted a position as a radiology technologist with Gram Resources, Inc. (Gram) in Hazard. The commute to Gram was the same as that to Appalachian—27.5 miles. The work schedule, however, was consistent with Turner's child care situation and paid her an hourly wage of $17. However, her schedule gradually expanded and she was required to work late hours and weekends. This made it difficult for Turner to meet her child care needs. In addition, her relationship with her supervisor deteriorated.[8]

Turner's personal predicament reached its pinnacle on July 6, 2002, when she was arrested on drug and fraud charges. Earlier that day, Turner was treated for a toothache at the University of Kentucky's Hospital. She was prescribed Percocet, a pain medication, and given an appointment for a tooth extraction the next day. After leaving the hospital, however, Turner went directly to Central Baptist Hospital and attempted to get an injection of Demerol, another form of pain medication. Somehow, the treating doctor learned that Turner was administered pain medication earlier that day at the University of Kentucky's Hospital and asked her about it. Turner denied receiving the earlier medication and the doctor notified law enforcement. Turner was arrested and charged with attempting to obtain a controlled substance by fraud.[9] Shortly after her arrest, Turner resigned from Gram. While employed by Gram, Turner earned $8,125.01 in 2001 and $19,939.58 in 2002.[10]

Around the time that Turner resigned from Gram, in August 2002, Turner married Jon Back. Turner was then living with Back in Wolverine, Kentucky, a town near Jackson, while Back would commute to his job for a coal company in West Virginia and return home on occasion. Turner managed to obtain employment again with MSN. While the commute to MSN was 89 miles each way, the hourly pay was slightly more than her pay at Gram and the schedule was more flexible. However, Turner worked at MSN only 10 days over the course of several weeks, earning $2,919, before resigning that position as well.[11] Turner's decision to resign, as well as her subsequent employment search efforts over the next 6 months, was clearly affected by her new marriage. Turner's child remained in school in Jackson during the fourth quarter of 2002 and the first quarter of 2003. However, Turner would go to live with Back for certain extended periods of time and, as such, did not make serious efforts to find employment for the next several months.[12]

Turner resumed her employment search efforts on March 23, 2003, when she completed an online application for a position at Clark. In her application, she inaccurately stated that she had not worked previously for Clark. During an initial telephone interview by Sherry Wells, Clark's director of radiology, Turner stated, in pertinent part, that she got married and moved to West Virginia, where she resided from August 2002 to February 2003. Wells generated a handwritten note listing Turner's employment history in chronological order. When she came in for the follow-up interview, Turner reviewed, signed the bottom of Wells' handwritten note, and was hired.[13]

Turner started her full-time employment with Clark on May 5, 2003. On September 30, 2003, while still employed by Clark, the Board decided the underlying unfair labor practice case in Turner's favor.[14] The Respondent refused, however, to reinstate Turner and, instead, filed an appeal with the United States Court of Appeals for the District of Columbia Circuit (Court of Appeals). On June 3, 2005, the Court of Appeals affirmed the Board's 2003 Order. That Order required, in pertinent part, that the Respondent reinstate Turner to her former position. The Respondent did not, however, contact Turner and reinstate her. Without contacting her to discuss the circumstances, the Respondent simply concluded that Turner's arrest and conviction

[8] I found Turner's testimony credible as to her attempts to find work, as well as the personal reasons for changing jobs during the period leading up through the second quarter of 2002. (Tr. 133–139, 143–149, 211–225.)

[9] Given her guilty plea, I was not impressed by Turner's explanation. It is difficult to imagine, if her assertion was true and she was merely attempting to alleviate a toothache, she would have lied to medical providers and a security guard as to her treatment at another hospital earlier that day. (Tr. 291–292; R. Exh. 8.)

[10] Through Ken Holbrook, Gram resources' administrator, the Respondent offered proof that Turner was a terrible employee who once falsified her timecard and was disciplined for absences, lateness, insubordination, and refusing and denying care to patients. Accordingly, he was prepared to terminate Turner in July 2002, but did not do so because she informed him that same month that she was resigning. (Tr. 146, 230, 239–241, 339–342, 347–349, 359–360, 364–367.) The important fact here, however, is that Turner was not terminated and it was not established that she knew she was about to be terminated before leaving to accept another position.

[11] Jon Back did not testify. While it is not disputed that Turner married Back and they moved into the same home in Wolverine, I did not find that he came home as often as every weekend. As discussed, infra at fn. 13, Turner went to live with Back in West Virginia for certain periods of time–enough that she would tell someone several months later that she moved to West Virginia. (Tr. 225–227, 308–309.)

[12] This finding is based on the fact that I did not find it credible that Turner went to live with her husband in West Virginia on only one occasion and for only a few days before returning to Kentucky. (Tr. 290–291, 666–668.) Turner failed, however, to produce any documentation of her efforts to find employment, as she was advised to do, or receipt of unemployment compensation, as she claims, during that period of time. (Tr. 672.) More importantly, as discussed, infra at fn. 13, I find that she told a prospective employer in March 2003 that she had been living in West Virginia since August 2002.

[13] Turner denied telling Wells that she lived in West Virginia for any significant amount of time in 2002–2003. (Tr. 670.) I did not, however, credit such testimony and relied on Wells' version of the interview. Wells' testimony was consistent with the note, which was made in the regular course of business, and contains the indicia of reliability. (R. Exh. 3, 16; Tr. 227, 288, 331, 649–650, 669–670.) Moreover, Turner lied on the application as to whether she worked previously at Clark. (Tr. 323–326.) As such, since Turner was in West Virginia for significant periods of time between August 2002 and February 2003, and her alleged efforts to find work were based in Kentucky, I find that she did not undertake any serious efforts to find work anywhere.

[14] 340 NLRB 536.

precluded reinstatement under its "Discipline and Discharge" policy. Policy B.7 listed dischargeable offenses, which included a felony conviction. However, falling into the list did not automatically trigger a discharge, as the policy simply stated that such a violation "may" result in discharge. The policy also provided a process to be followed during an investigation into any alleged violation.[15]

Turner's employment with Clark continued until March 28, 2004, when she went on leave pursuant to the Family Medical Leave Act (medical leave) for 5 weeks. She returned to work on April 26, 2004, and worked continuously until November 2005, when she went on medical leave again. On May 9, 2006, Turner gave birth to her second child. At that point, however, Turner's position was open and she was eligible for rehire. Turner's position remained open until May 22, 2006, but she did not receive medical clearance to return to work until June 25, 2006. At Clark, Turner earned $25,029.32 in 2003, $46,964.30 in 2004, $54,900.30 in 2005, and $257.18 in 2006.[16]

For the next year, Turner remained unemployed, collected unemployment compensation benefits, moved into her parents' home, and collected child support from Back, whom she divorced in August 2006. In accordance with her responsibilities as a recipient of unemployment compensation benefits, Turner made numerous attempts to find employment. Those efforts included inquiries with her former employer at Clark, Appalachian, Gram, University of Kentucky's Hospital, Jupiter Health Clinic in Jackson, and medical offices in Winchester, Hazard, and Jackson. In July 2007, Turner finally obtained employment as an ultrasound technologist with Ace Clinique in Hazard, Kentucky. Turner remains employed at Ace Clinique, earning $17.00 per hour.[17]

[15] I did not find it credible that Bevins based his decision on any criteria other than the fact that Turner was convicted of a felony. He testified that he took into account the following dischargeable offenses listed in the disciplinary policy—a felony conviction, the solicitation of drugs, fraud, and falsifying medical information. Of those listed, however, only a felony conviction is included as a dischargeable offense. Furthermore, Bevins testified that he only learned of Turner's conviction in 2005. That assertion, however, was based on uncorroborated hearsay from a former employee, and the timing as to when he allegedly learned about Turner's arrest and conviction was too coincidentally close to the date that the court of appeals reaffirmed the Board's Order requiring the Respondent to reinstate Turner. (Tr. 413–416, 419–420, 428–435, 438, 449–450, 453–454, 476–477, 482–484, 487–488; R. Exh. 8; GC Exh. 5.)

[16] I based this finding on Turner's credible and unrefuted testimony regarding her pregnancy and the related complications that kept her out of work for this period of time. (Tr. 151, 197; GC Exh. 8.)

[17] In contrast to her earlier period of unemployment in 2002, Turner documented her unemployment compensation benefits received in 2006. (GC Exh. 12.) Given her responsibilities under the unemployment compensation benefits system, as well as the specificity as to the individuals with whom she spoke at the various hospitals, I found it credible that Turner made serious efforts to obtain employment during this period. (Tr. 131–132, 151–152, 155, 197, 242–254, 373–374, 642–643.) As to the discrepancy between her and Barry Linderman, her former supervisor at Clark, as to whether she contacted him, I credited Turner's version. In contrast to Turner, Linderman hedged as to whether Turner contacted him after she left his employ ("she may have called me") and his tone conveyed a sense of significant resentment toward Turner. (Tr. 334.)

## II. THE COMPLIANCE SPECIFICATION

The burden is on the General Counsel to show the gross backpay due, that is, the amount of wages the discriminatee would have received but for the employer's illegal conduct." *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230–231 (5th Cir. 1973), cert. denied 414 U.S. 822 (1973); *La Favorita, Inc.*, 313 NLRB 902 (1994). The General Counsel has discretion in selecting a formula that will closely approximate backpay and need only establish that the gross backpay amounts specified are reasonable and not an arbitrary approximation. *Performance Friction Corp*., 335 NLRB 1117 (2001); *Mastell Trailer Corp.*, 273 NLRB 1190, 1190 (1984). Once established, it is the employer's burden to establish defenses to mitigate its backpay liability by demonstrating the willful loss of interim earnings to be deducted from gross backpay. *Basin Frozen Foods, Inc.*, 320 NLRB 1072 (1996).

Jon Grove, a Board compliance officer, prepared the amended second compliance specification based on the Order in the underlying case, Turner's W-2 forms, payroll records from the Respondent, Social Security Administration records, payroll records from interim employers, and mileage calculations obtained from the well-known Mapquest.com internet website. The gross backpay calculation was based on Turner's prorated earnings from the Respondent during 2000 and converted to an average weekly salary for that year. Grove's then calculated backpay through the first quarter of 2007 by applying wage increases afforded the Respondent's employees through the first quarter of 2007.[18] Turner's backpay was either eliminated or reduced in proportion to the time that she did not work during the fourth quarter of 2005, the first quarter of 2006, and the period that she was on maternity leave—October 28, 2005, through June 25, 2006. The net interim earnings were deducted from the gross backpay to yield the net backpay that Turner is owed through the first quarter of 2007—$100,532, plus accrued interest.[19]

The Respondent does not challenge the formula or the calculations used to arrive at the gross backpay as set forth in the compliance specification. It does, however, contend that further offsets are in order. Although extensively explored by the Respondent, Turner's checking accounts failed to reveal additional sources of income from interim employers warranting further offsets to backpay. Turner's accounts at the Citizen's Bank in Jackson, Kentucky, and Central Trust/Winchester Bank in Lexington, Kentucky, reflected numerous deposits relating to child support from her ex-husband ($930 deposited on July 13, 2006, $7,868 deposited on September 15, 2005, $900 deposited on June 28,2005, $700 deposited on February 14, and $300 on February 21, 2005); a long term insurance disability payment ($3,062.05 deposited on May 24, 2006); income tax refunds ($2,355.05 deposited on February 3, 2001); and a family inheri-

[18] It is not disputed that the Respondent provided Grove with such information. (GC Exh. 3, Appendix A.)

[19] Grove first met with Turner on November 17, 2003, and advised her to document all employment search efforts. (GC Exh. 6–26; Tr. 41–45, 48–51.)

tance ($1,000 deposited on March 27, 2001).[20]

With the exception of periods for which Grove tolled backpay because Turner was either pregnant or suffering from related complications, there was only one period of time in which the Respondent demonstrated a willful loss of earnings by Turner—the last quarter of 2002 and first quarter of 2003. Grove estimated the gross backpay during each of those quarters at $10,477. During this period of time, Turner essentially removed herself from the job market by spending significant periods of time in West Virginia with her husband. Her situation during this period of time was corroborated by her representations during the job interview with Sherry Wells, Clark's director of radiology. Since Turner failed to mitigate during this period of time, backpay is tolled for this portion of the backpay period. See *St. George Warehouse,* 351 NLRB 961, 963 (2007). Accordingly, I have reduced her gross backpay by $20,954. The gross backpay, as stated in the compliance specification, is reduced to $237,016.

As to the remainder of the backpay period, the Respondent failed to establish a willful loss of earnings on the part of Turner. Simply showing that Turner, at various times during the backpay period, failed to obtain or retain interim employment, does not meet this burden. *Black Magic Resources*, 317 NLRB 721 (1995). Turner did leave several interim jobs for comparable positions at other facilities, but only after the schedules changed dramatically. The new positions were either located closer to her home and/or enabled her to pick up her child after school—not unreasonable considerations on the part of a single parent attempting to be self-supporting. *Flannery Motors, Inc.*, 330 NLRB 994, 995 (2000) ("good faith effort requires conduct consistent with an inclination to work and to be self-supporting and that such inclination is best evidenced . . . by the sincerity and reasonableness of the efforts made by an individual in his circumstances to relieve his unemployment."). As such, Turner made a good-faith effort to obtain or retain employment, which is good enough. *Fabi Fashions*, 291 NLRB 586, 587 (1988); *Arlington Hotel*, 287 NLRB 851 (1987); *NLRB v. Madison*, 472 F.2d 1307, 1319 (D.C. Cir. 1972); *NLRB v. Arduni Mfg. Co.,* 394 F.2d 420, 422–423 (1st Cir. 1968). With respect to the period during and after the third quarter of 2006—after she lost her position at Clark due to extended medical leave resulting from her pregnancy—Turner's job search efforts are further evidenced by the fact that she applied for and received unemployment compensation benefits during this time. The Board has found that a discriminatee's receipt of unemployment benefits is corroborative of reasonable efforts to seek interim employment. *Superior Protection, Inc.,* 347 NLRB 1197, 1199 (2006); *Birch Run Welding,* 286 NLRB 1316, 1319 (1987).

### III. THE RESPONDENT'S REFUSAL TO REINSTATE TURNER BECAUSE OF HER FELONY CONVICTION

The Respondent also contends that backpay liability was tolled on August 27, 2002, when Turner was convicted of a felony. Specifically, the Respondent contends that it had a policy precluding the employment or continued employment of any individual convicted of a felony. That policy, however, simply lists violations which "may" result in an employee's discharge.[21]

Whether to reinstate Turner after her conviction on a controlled substance-related charge was not an issue of first impression for the Respondent. In 1996, Carol Hudson, a registered nurse in the Respondent's medical-surgical department, was arrested and subsequently convicted of a felony for growing and selling marijuana from her home. At the time of her felony drug conviction, the Respondent allegedly had a policy requiring that employees convicted of a felony be terminated. Hudson did not report her felony drug arrest to the Respondent until after she was convicted. After discussing the matter with Hudson's attorneys, Bevins investigated the circumstances of her arrest, spoke with her probation officer, and agreed to retain Hudson, "with conditions to work by." Hudson subsequently resigned in 2002, but that was unrelated to her narcotics arrest or the related "employment conditions." Hudson, like Turner, had been in constant contact with patients. It is noteworthy, however, while Hudson's nursing duties included administering various drugs to patients, Turner's exposure to controlled substances as an x-ray technician was limited to administering contrast dye and a radioactive liquid.[22]

In addition to Hudson and Turner, during the period of 2000–2007, at least 24 other employees have informed the Respondent of their abuse of controlled substances. In accordance with its employee assistance policy, the Respondent has not discharged any of them. Instead, it has provided them with in-house counseling and, if necessary, drug rehabilitation services. Most notably, it is well known that one of the Respondent's staff physicians is currently enrolled in a drug rehabilitation program, yet continues in the Respondent's employ and treats patients on a regular basis.[23]

Based on the foregoing, the evidence demonstrates that the Respondent applied its disciplinary policy to Turner in an arbitrary and capricious manner. Unlike Hudson's situation, the Respondent failed to even consider the circumstances of Turner's conviction. Like Hudson, Turner also had an explanation for her dereliction, which she explained to the court in her plea application. The Respondent, clearly affected by the pending litigation with Turner, deliberately misconstrued its disciplinary policy in order to curtail its backpay liability. Accordingly, there is no legitimate justification for the Respondent's refusal to reinstate Turner and provide her with the accrued backpay.

[20] (R. Exh. 20–21; Tr. 270, 600–625).

[21] Section 5.0 of policy B.7 became effective on October 1, 1997, and was apparently still in force as of 2005. (GC Exh. 5.)

[22] The versions provided by Hudson and Bevins as to this development were consistent. (Tr. 77–87, 119, 479–480; GC Exhs. 4–5, 28.)

[23] Given that the Respondent stipulated to these extremely revealing statistics, I precluded the General Counsel from pursuing unnecessarily cumulative testimony as to the individual circumstances of each employee involved. The stipulation also enabled me to avoid inquiry into the personal circumstances of numerous individuals who approached the Respondent's employee assistance program in confidence, while enabling the General Counsel to establish its point—that the Respondent has a policy of providing its drug-addicted employees with counseling and other rehabilitation services, rather than discharging them. (Tr. 545–553, 565, 576–581.)

On these findings of fact, conclusions of law, and on the entire record, I issue the following recommended[24]

ORDER

The Respondent, Jackson Hospital Corporation d/b/a Kentucky River Medical Center, its officers, agents, successors, and assigns, shall, consistent with the compliance specification as modified by the foregoing findings, satisfy the obligation to make whole Melissa Turner by paying her the amount of $79,577, together with interest accrued to the date of payment, as computed in the manner described in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and State laws.

Dated, Washington, D.C. February 26, 2008

[24] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.